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Louisiana's Parol Evidence Rule: Civil Code Article 2276

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LOUISIANA'S PAROL EVIDENCE RULE: CIVIL CODE
ARTICLE 2276

"Parol evidence shall not be admitted against or beyond what is contained in the act, nor on what may have been said before or at the time of making them or since." LA. CIV. CODE art. 2276.

The parol evidence rule involves the relationship "between a written instrument and data extrinsic to the writing,"¹ objected to as tending to contradict or add to the writing. Although the parol evidence rule is related to the requirement that certain agreements be in writing to be enforceable,² the two issues are separate.³ The present discussion is limited to discovering when attempts to vary or extend writings will be deemed proper by Louisiana courts and assumes that any writing requirement has been satisfied.

The preference of a legal system for the use of written rather than parol evidence may be based on one of two theories: the writing may be viewed as embodying the substance of the agreement or it may simply serve as evidence of the consent of the parties. The common law parol evidence rule is based on the former theory; the writing itself is considered to constitute the agreement between the parties and parol evidence tending to establish other circumstances or terms is therefore irrelevant.⁴ The common law preference for a writing over parol is more a rule of substance⁵ than one of evidence because it is necessary to examine all the circumstances to determine if the writing constitutes the complete and accurate agreement of the parties. As a result, the common law has developed a number of exceptions permitting admission of parol evidence against or beyond a writing to establish that the writing does not contain the full agreement of

1. Comment, 47 TUL. L. REV. 381 (1973).

2. *E.g.*, LA. CIV. CODE art. 2275. *See generally* Comment, 35 LA. L. REV. 764 (1975).

3. Although the issues are separate, the Louisiana supreme court often discusses them together. *See, e.g.*, *Landis v. Agnew*, 154 La. 435, 97 So. 601 (1923); *Bostwick v. Thompson*, 149 La. 152, 88 So. 775 (1921); *Sharkey v. Wood*, 5 Rob. 326 (La. 1843). Application of the two rules generally produces the same result, *i.e.*, exclusion or non-exclusion of parol; however, the failure to distinguish the concepts may lead to incorrect results. *See, e.g.*, *Clamagaron v. Sacerdotte*, 8 Mart. (N.S.) 533 (La. 1830).

4. 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2426, at 83-87 (3d ed. 1940) [hereinafter cited as WIGMORE]. *See also* Comment, 3 LA. L. REV. 427, 431 (1941).

5. *See* S. WILLISTON & G. THOMPSON, SELECTIONS FROM WILLISTON'S TREATISE ON THE LAW OF CONTRACTS § 632, at 502 (Rev. ed. 1938) [hereinafter cited as WILLISTON]; WIGMORE § 2400, at 3; 3 A. CORBIN, CORBIN ON CONTRACTS § 573 at 357-70 (1960) [hereinafter cited as CORBIN].

the parties.⁶

In the civil law, the preference for a writing is not a substantive requirement, but rather an evidentiary one.⁷ Writings are favored over parol because they are considered more reliable than the memory of witnesses and more trustworthy.⁸ To protect the writing from attack, the civil law broadly excludes parol whenever a writing is involved. Exceptions to the rule are much less numerous than at common law⁹ because parol admitted to establish an exception is as untrustworthy as any other parol.

Since Louisiana's Civil Code article 2276 descended from Roman and French law, the rule of exclusion in Louisiana should be dispensed with only in limited circumstances.¹⁰ However, the Louisiana supreme court has not applied the article as broadly as civilian theory might require and has recognized many common law exceptions. In addition, the scope of the rule has been limited by a narrow judicial construction of certain terms in the article and by several statutory exceptions. This comment will examine the methods by which the Louisiana supreme court has narrowed application of the parol evidence rule and will attempt to justify the deviation from civilian theory.¹¹

Parol Defined

At common law, the parol evidence rule serves not only to exclude evidence given orally, but prohibits written extrinsic evidence as well. The rationale for the exclusion is that the subsequent written evidence is as irrelevant to an agreement represented by a prior writing as would be parol.¹² In contrast, the theory of exclusion at civil law is grounded upon a distrust of parol itself; hence, the parol evidence rule in civil law jurisdictions should apply only to oral evidence. Consistent with civilian theory, the Louisiana supreme court has generally recognized that the parol evidence rule excludes only oral testimony and does not extend to extrinsic writings.¹³ Although

6. CORBIN §§ 573-96; WIGMORE §§ 2400-78; WILLISTON §§ 631-46.

7. See generally Comment, 35 LA. L. REV. 745, 752 (1975).

8. 2 PLANIOL, CIVIL LAW TREATISE pt. 1, no. 1136, at 646 (11th ed. La. St. L. Inst. transl. 1959) [hereinafter cited as PLANIOL]; Comment, 3 LA. L. REV. 427, 431 (1941); Note, 8 LA. L. REV. 427 (1948).

9. See generally Comment, 35 LA. L. REV. 745 (1975).

10. See *The Work of the Louisiana Supreme Court for the 1957-1958 Term — Conventional Obligations*, 19 LA. L. REV. 315, 317-18 (1959).

11. For a more theoretical analysis, see Comment, 47 TUL. L. REV. 381 (1973).

12. See WIGMORE § 2426.

13. See *The Work of the Louisiana Supreme Court for the 1953-1954 Term —*

the Louisiana supreme court has used article 2276 language in a few cases involving conflicting written instruments, a close reading of the cases indicates that the language was concerned with parol advanced to corroborate one of the writings.¹⁴

The courts have held that a party may not object to the introduction of his own answer to an interrogatory,¹⁵ indicating that such answers are not parol for purposes of article 2276. Likewise, the parol evidence rule should not be interpreted to exclude testimony under oath given by the party objecting to its introduction. Although the question provoking such testimony could be objected to as soliciting an answer contradictory to the writing, if there is no objection or if the declaration is spontaneous, it appears that the testimony should not be excluded by article 2276.

Act Defined

There is no explicit discussion in the jurisprudence of the meaning of "act" in article 2276; hence, its definition must be inferred from the applicability or non-applicability of the parol evidence rule in specific cases. Although it has been suggested that "act" encompasses "any recital,"¹⁶ the jurisprudence indicates that the scope of the term is narrower.¹⁷ There is no doubt that "act" includes an authentic act¹⁸ as well as written contracts affecting either movable or immova-

Conventional Obligations, 15 LA. L. REV. 280, 285 (1955); Note, 8 LA. L. REV. 427 (1948).

14. See *Jackson Brewing Co. v. Wagner*, 117 La. 875, 42 So. 356 (1906); *Singleton v. Smith*, 4 La. 430 (1830). In *Brewer v. New Orleans Land Co.*, 154 La. 446, 97 So. 605 (1923), the only case citing article 2276 as authority for excluding a writing and implying that the parol evidence rule was applicable, an unsigned memorandum was matched against an authentic act. It is suggested that despite the claimed reliance on article 2276, the true basis of the decision was a balancing of the relative probative values of the inherently trustworthy authentic act and inherently untrustworthy memorandum.

15. See, e.g., *Tessier v. La Nasa*, 234 La. 127, 99 So. 2d 56 (1958); *Smith v. Bell*, 224 La. 1, 68 So. 2d 737 (1953); *Templet v. Babbitt*, 198 La. 810, 5 So. 2d 13 (1941); *Franton v. Rusca*, 187 La. 578, 175 So. 66 (1937).

16. *The Work of the Louisiana Supreme Court for the 1945-1946 Term — Conventional Obligations*, 7 LA. L. REV. 227 (1947).

17. Clearly oral agreements or representations are not "acts" under article 2276. *Goldsmith v. Parsons*, 182 La. 122, 161 So. 175 (1935). Cf. *Burk v. Livingston Parish School Bd.*, 215 La. 143, 39 So. 2d 891 (1949); *Krauss v. Fry*, 209 La. 250, 24 So. 2d 464 (1945).

18. See, e.g., *Smith v. Bell*, 224 La. 1, 68 So. 2d 737 (1954); *Templet v. Babbitt*, 198 La. 810, 5 So. 2d 13 (1941); *Johnson v. Johnson*, 191 La. 408, 185 So. 299 (1939); *Franton v. Rusca*, 187 La. 578, 175 So. 66 (1937).

ble property.¹⁹ The instrument need not be one of sale or transfer; the court has implied that agreements to construct a building²⁰ and to settle partnership accounts²¹ are also acts.

The Louisiana supreme court has used the same criteria for determining if an exception to the parol evidence rule exists, whether the act is in authentic or nonauthentic form.²² This practice appears to be reasonable when employed to determine the *admissibility* of parol evidence under article 2276. However, since the authentic act is "full proof of the agreement contained in it,"²³ it may be questioned whether the admitted parol should be allowed to outweigh the declarations of the authentic act and thereby to deprive the authentic act of meaning.

Some older cases, reasoning that one should not be allowed to vary his own written declarations, indicated that a unilateral writing would be accorded act status when the writer desired to introduce parol evidence.²⁴ For example, in one case, a party was not allowed to use parol to establish that his intentions in relation to a compromise differed from what he had previously expressed in a letter.²⁵ However, absent some formality to ensure correctness of a unilateral writing (*e.g.*, embodying the instrument in an authentic act), a person other than the author of the writing has been allowed to use contradictory or additive parole.²⁶ For example, the rule of exclusion was inapplicable when a plan of a land area was made by a person

19. *Burk v. Livingston Parish School Bd.*, 215 La. 143, 39 So. 2d 891 (1949). See, *e.g.*, *Moosy v. Huckabay Hosp., Inc.*, 283 So. 2d 699 (La. 1973); *Gulf States Fin. Corp. v. Airline Auto Sales, Inc.*, 248 La. 591, 181 So. 2d 36 (1965). The early case of *Clamagaron v. Sacerdotte*, 8 Mart. (N.S.) 533 (La. 1830) suggested that application of article 2276 should be limited to written contracts affecting immovable property because article 2276 follows article 2275 which requires the sale of immovables to be in writing. However, numerous later cases have applied article 2276 to agreements affecting movable property, and it is now clear that the rule applies to agreements involving movables as well as immovables. See, *e.g.*, *Cary v. Richardson*, 35 La. Ann. 505 (1883); *Angomar v. Wilson*, 12 La. Ann. 857 (1857); *Knox v. Liddell*, 5 Rob. 111 (La. 1843).

20. *Moosy v. Huckabay Hosp., Inc.*, 283 So. 2d 699 (La. 1973).

21. *Pickens v. Friend*, 26 La. Ann. 585 (1874).

22. *Cf. Smith v. Bell*, 224 La. 1, 68 So. 2d 737 (1953); *Ball v. Campbell*, 219 La. 1076, 55 So. 2d 250 (1951); *Ridgely v. Fabacher*, 180 La. 171, 156 So. 212 (1934).

23. LA. CIV. CODE art. 2236.

24. See *Shannon v. Shannon*, 188 La. 588, 177 So. 676 (1937); *Mather v. Knox*, 34 La. Ann. 410 (1882); *Selby v. Friedlander*, 22 La. Ann. 381 (1870).

25. *Selby v. Friedlander*, 22 La. Ann. 381 (1870).

26. *Cf. Pharr v. Gall*, 108 La. 307, 32 So. 418 (1902); *Hill v. Spangenberg*, 4 La. Ann. 553 (1849); *Morgan v. Livingston*, 6 Mart. (O.S.) 19 (La. 1819). The rule in these cases may be derived from the French theory of "commencement of proof." See Comment, 35 LA. L. REV. 745, 752 (1975).

other than the one offering the parol evidence.²⁷ The court implied, however, that had the correctness or verity of the instrument been established, the parol evidence would have been excluded, indicating that the plan would then have been treated as an "act."²⁸

Language in a more recent case, however, might signal that the protection of article 2276 is limited to agreements and does not extend to unilateral writings. In *Burk v. Livingston Parish School Board*,²⁹ the court admitted parol to explain a minute entry of a school board resolution, noting that before the parol evidence rule is applicable there must be a written contract.³⁰ However, the language was not necessary to the holding of the case; the decision could have been sustained on the basis that parol evidence will not be excluded when offered *against* the author of a unilateral writing. Unfortunately, there have been no decisions since *Burk* to indicate whether in the future the application of the parol evidence rule in Louisiana will be limited to written contracts.

A number of cases have considered the applicability of article 2276 to bills of lading and receipts. If a bill of lading can be considered a contract amounting to a "title translatif of property," the instrument has "act" status and the parol evidence rule generally applies.³¹ Conversely, if the bill of lading merely acknowledges the receipt of property or confesses delivery, it is a mere receipt; parol evidence is admissible even if it tends to contradict or vary the receipt, apparently because such instruments are not "acts" within the meaning of article 2276.³² However, a receipt or recital of payment contained in

27. *Morgan v. Livingston*, 6 Mart. (O.S.) 418 (La. 1819).

28. Although the reluctance of courts to allow consideration of evidence varying official records might more accurately be attributed to something other than application of the parol evidence rule (see *Burk v. Livingston Parish School Bd.*, 215 La. 143, 39 So. 2d 891 (1949)), the court has used article 2276 language in passing on the admissibility of parol contradicting official records, such as records of court and various types of business and government documents. See, e.g., *Pittman v. Riverside Realty Co.*, 214 La. 71, 36 So. 2d 642 (1948); *State v. Doyle*, 42 La. Ann. 640, 7 So. 699 (1890); *Formento v. Robert*, 27 La. Ann. 489 (1875); *Henderson v. Walmsly*, 23 La. Ann. 562 (1871); *Clark v. Slidell*, 5 Rob. 330 (La. 1843). When the body making the record is the party seeking to use the parol, the rule of exclusion will more likely be applied. See *Burk v. Livingston Parish School Bd.*, 215 La. 143, 39 So. 2d 891 (1949).

29. 215 La. 143, 39 So. 2d 891 (1949).

30. *Id.* at 150, 39 So. 2d at 893. See also *PLANIOL* no. 1139A at 647-48.

31. E.g., *Wichita Falls Motor Co. v. Kerr*, 160 La. 992, 107 So. 777 (1926); *Barfield v. Saunders*, 116 La. 136, 40 So. 593 (1906); *Sonia Cotton-Oil Co. v. The Red River*, 106 La. 42, 30 So. 303 (1901).

32. See, e.g., *Owen v. Tangipahoa Bank & Trust Co.*, 180 La. 747, 157 So. 549 (1934); *Hunt & Macaulay v. Mississippi Cent. R.R.*, 29 La. Ann. 446 (1877); *Borden v. Hope*, 21 La. Ann. 581 (1869); *Gray v. Lonsdale*, 10 La. Ann. 749 (1885). See

an authentic act or in a written agreement will be accorded the status of the instrument in which it is embodied.³³

Against or Beyond the Act

The prohibitions of article 2276 only apply when the evidence offered is "against or beyond" the terms of the act. The Louisiana supreme court has seized upon the phrase to require an addition to or contradiction of the writing and thus has confined the article's broad language. Parol is against the act when it is offered to contradict, to vary, or "to prove the falsity of what is therein stated";³⁴ it is "beyond" the act when the offered evidence will "add to the act a clause which it does not contain, or . . . enlarge those which it does contain."³⁵

Determination of whether parol contradicts a writing is generally a simple process; the writing is consulted and if none of its provisions are contrary to the parol, the extrinsic evidence is admissible. For example, in *Parker v. Broas*,³⁶ a suit on a note, parol evidence that a loan was made in Confederate money was admitted to establish a failure of consideration. The court ruled that the evidence was not "against" the act because nothing in the note indicated that the loan was not in Confederate money.

Parol evidence is "beyond" the act when the fact to be established by parol adds an additional term affecting the legal relations resulting from the agreement. Clearly, parol evidence as to a warranty or price not mentioned in the agreement would add a term to the act.³⁷ In contrast, parol evidence as to a fact collateral to the agreement would not add a term to the act³⁸ and thus would not

Comment, 3 LA. L. REV. 427, 444 (1941). *But see* Mather v. Knox, 34 La. Ann. 410 (1882); Knox v. Liddell, 5 Rob. 111 (La. 1843).

33. *See, e.g.*, Johnson v. Johnson, 191 La. 408, 185 So. 299 (1938); Brewer v. New Orleans Land Co., 154 La. 446, 97 So. 605 (1923); Trager v. Louisiana Equitable Life Ins. Co., 31 La. Ann. 235 (1879). In a few cases, the court announced that the relationship between commercial and investment paper and parol evidence is not governed by article 2276. Shannon v. Shannon, 188 La. 588, 177 So. 676 (1937); Belknap Hardware & Mfg. Co. v. Hearn, 179 La. 909, 155 So. 396 (1934). *See also* PLANIOL no. 1140 at 648. However, the rule appears to apply only to the commercial paper itself and not to any underlying transaction.

34. Moore v. Hampton, 3 La. Ann. 192, 195 (1848). *See also* PLANIOL no. 1138 at 646-47.

35. Moore v. Hampton, 3 La. Ann. 192, 195 (1848).

36. 20 La. Ann. 167 (1868).

37. *See, e.g.*, Louisiana Sulphur Mining Co. v. Brimstone R.R. & Canal Co., 143 La. 743, 79 So. 324 (1918); Neal v. Succession of Hyce, 133 La. 298, 62 So. 932 (1913); Dwight v. Kemper, 8 La. Ann. 452 (1853); PLANIOL no. 1138 at 646-47.

38. *See, e.g.*, Wampler v. Wampler, 239 La. 315, 118 So. 2d 423 (1960); Tessier v.

violate the parol evidence rule. For example, in the *Parker* case, parol that the loan was made in Confederate money, in the absence of an express statement on the subject in the writing, was not considered a term, and thus the proof did not add to the act.

The distinction between direct and collateral use of parol evidence is further illustrated by contrasting the holdings of *Bogan v. Calhoun*³⁹ and *Bernheim v. Pessou*.⁴⁰ In a suit on a promissory note, the court in *Bogan* excluded parol evidence tending to prove that a person other than the signer of the note was liable on the instrument. In *Bernheim*, parol to the effect that the vendee of property was a person other than the party named in the act of sale was admitted in an action to execute on a mortgage, in order to prove that the mortgage was extinguished when the owner of the mortgage note bought the mortgaged property. Different results were reached in the two cases because in the former case the suit was on the transaction represented by the note, while in the latter, the writing was involved only collaterally.⁴¹

In an action collateral to the transaction represented by the written agreement, parol evidence establishing to whom or by whom money was paid will be admitted as not contradicting a general recital of payment. In *Richard v. Cain*,⁴² the plaintiff and the defendant owned property jointly which they sold by authentic act, reciting payment by the vendee. The plaintiff offered parol to establish that the defendant received the entire sum, for which he should account to the plaintiff; the defendant objected, claiming that the parol would be against or beyond the recital of payment. The court logically found that evidence as to who received the payment was not only consistent with and hence not against the recital of payment but also that it would not add a term to the agreement. Similarly, parol evidence showing that one of two parties on the same side of an act of compromise received a disproportionate share of the compromise funds is not against or beyond an act of compromise which recites only that the amount of the compromise has been paid.⁴³

La Nasa, 234 La. 127, 99 So. 2d 56 (1958); *Sparks v. Dan Cohen Co.*, 187 La. 830, 175 So. 590 (1937).

39. 19 La. Ann. 472 (1867).

40. 143 La. 609, 79 So. 23 (1918).

41. The court in *Bernheim* stated that the parol left the title to the real estate entirely unaffected. *Id.* at 613, 79 So. at 24.

42. 168 La. 608, 122 So. 866 (1929).

43. *Bradley v. Davis*, 128 La. 686, 55 So. 17 (1911). See also *Succession of Farley*, 205 La. 972, 18 So. 2d 586 (1944); *Hodge v. Hodge*, 151 La. 612, 92 So. 134 (1922); *Bernheim v. Pessou*, 143 La. 609, 79 So. 23 (1918); *Succession of Bagley*, 120 La. 922, 45 So. 942 (1908).

That the court will go to great lengths to find that parol evidence is not against or beyond the act can easily be demonstrated by the case of *Queensborough Land Co. v. Cazeaux*.⁴⁴ In *Cazeaux*, parol was admitted to establish the amount to be refunded after rescission of a sale of property, despite the resulting variance from the price recited in the act as having already been paid. The court's reasoning was apparently that the issue concerning which parol was admitted was somehow collateral to the writing which was concerned only with how much had been paid. The decision is questionable in light of the subsequent holding on identical facts in *Brewer v. New Orleans Land Co.*,⁴⁵ in which the court excluded parol evidence of the amount to be refunded. However, surprisingly the court in *Brewer* distinguished *Cazeaux* rather than overruling it;⁴⁶ hence, it is uncertain whether *Cazeaux* retains any validity.

The purpose for which the parol is offered may have an effect on whether the parol is found to be against or beyond the act. In *Jackson v. Hays*,⁴⁷ the vendee of a runaway slave sued the vendor in warranty. The vendor defended on the ground that he had orally informed the vendee that because the slave had run away once before, he would not warrant against that "defect." While the presence of a full guaranty in the written act of sale prevented admission of the evidence of the oral disclaimer, the court nevertheless found the evidence admissible to rebut allegations of fraud and concealment relevant to the redhibition suit.

Parties Affected by the Rule

If applied as written, article 2276 would preclude use of parol to contradict or add to the act even when the controversy is between two strangers to the act. The theory underlying exclusion is that parol is not rendered more trustworthy merely because other persons have been substituted for the parties to the act. Although consistent with civilian theory, strict application of the article would bind to the terms of the act persons who were not involved with its making and even those who do not succeed to the rights of a party to the act. Apparently because of the harshness of denying such persons the right to introduce parol evidence to vary the act, the Louisiana supreme court has limited the application of article 2276 to the parties

44. 136 La. 724, 67 So. 641 (1915).

45. 154 La. 446, 97 So. 605 (1923).

46. *Id.* at 455, 97 So. at 608.

47. 14 La. Ann. 577 (1859).

to the act and their "privies."⁴⁸

The jurisprudence is clear that parol is not excluded by article 2276 when the adversaries are both strangers to the act or when a stranger introduces parol against a party to the act.⁴⁹ There is a conflict in the cases, however, when a party to the act seeks to use parol against a stranger. In *Commercial Germania Trust & Savings Bank v. White*,⁵⁰ the Louisiana supreme court allowed introduction of parol under these circumstances; however, other cases have indicated the opposite without explicitly so holding, particularly when the stranger has relied on the terms of the act.⁵¹

The court has further limited the applicability of article 2276 to parties with adverse interests in the written instrument.⁵² For example, if the litigants were co-vendors, article 2276 would not be applied since the parties have identical interests in the written instrument. Some dicta in the jurisprudence indicates that the limitation will be followed even when the written instrument possesses the presumption of correctness of an authentic act.⁵³

Exceptions to the Rule

Writing Not Effective Between the Parties

The most widely recognized exception to the parol evidence rule allows use of parol to establish that the writing in question was not effective, in whole or in part, between the parties. This exception has been used to completely avoid the writing by establishing a defect in the formation of the agreement⁵⁴ or in the reduction of the agreement

48. *E.g.*, *Smith v. Chappell*, 177 La. 311, 148 So. 242 (1933); *W.K. Henderson Iron Works & Supply Co. v. Jeffries*, 159 La. 620, 105 So. 792 (1925). The *Henderson* case overruled prior cases to the contrary.

A "privy" has been defined as "one who has succeeded to some right or obligation which one of the parties to the act derived through the act or incurred under it." *Commercial Germania Trust & Sav. Bank v. White*, 145 La. 54, 59-60, 81 So. 753, 755 (1919). *See Fudickar v. Inabnet*, 176 La. 777, 146 So. 745 (1933) (corporate officer); *Hollingsworth v. Atkins Bros.*, 46 La. Ann. 515, 15 So. 77 (1894) (partner).

49. *See, e.g.*, *Succession of Gibson*, 186 La. 723, 173 So. 185 (1937); *Smith v. Chappell*, 177 La. 311, 148 So. 242 (1933); *W.K. Henderson Iron Works & Supply Co. v. Jeffries*, 159 La. 620, 105 So. 792 (1925).

50. 145 La. 54, 81 So. 753 (1919).

51. *See, e.g.*, *Baker v. Baker*, 209 La. 1041, 26 So. 2d 132 (1946); *Gabert v. St. Tammany Yacht Club*, 166 La. 57, 116 So. 667 (1928); *Loranger v. Citizen's Nat. Bank*, 162 La. 1054, 111 So. 418 (1927).

52. *Wampler v. Wampler*, 239 La. 315, 118 So. 2d 423 (1960); *Richard v. Cain*, 168 La. 608, 122 So. 866 (1929). *See Succession of Gibson*, 186 La. 723, 173 So. 185 (1937).

53. *Richard v. Cain*, 168 La. 608, 122 So. 866 (1929).

54. Because the party offering the parol is attempting to avoid the instrument

to writing. Although parol to establish that the agreement was not effective between the parties is as untrustworthy as other parol, the Louisiana Civil Code implicitly contemplates use of extrinsic evidence in such circumstances.⁵⁵ Thus, application of this exception in Louisiana does not appear to deviate from civilian theory.

While the lack of any of the requisites for the formation of a valid agreement⁵⁶ may presumably be established by parol, proof of the lack of consent is most often involved. Parol evidence that fraud or misrepresentation induced consent to the agreement is clearly admissible.⁵⁷ It is not necessary that the fraud or misrepresentation be perpetrated on a party to the act; it is sufficient that the one desiring to establish the fraud has been injured by it.⁵⁸ Once proper allegations⁵⁹ are made, evidence of the fraud or misrepresentation is admissible, with the substantive law of fraud determining if the evidence is sufficient to merit relief.⁶⁰

Although an act embodying a recital of payment may not normally be contradicted by parol evidence of nonpayment, such evidence may be used to establish circumstances tending to prove or corroborate fraud. In *Logan v. Walker*,⁶¹ the plaintiff was not allowed

rather than change or add to it, it may be questioned whether the parol evidence rule is applicable. However, it may be that since the parol evidencing the alleged defect was not included in the act, its admission would be "beyond the act," thus justifying application of article 2276. In any case, the Louisiana supreme court has tacitly assumed that the parol evidence rule is involved by treating admission of such evidence as an exception to the rule. *Cf., e.g., Gulf States Fin. Corp. v. Airline Auto Sales, Inc.*, 248 La. 591, 181 So. 2d 36 (1965); *Templet v. Babbitt*, 198 La. 810, 5 So. 2d 13 (1941); *Hemler v. Adcock*, 166 La. 704, 117 So. 781 (1928). *But see Overby v. Beach*, 220 La. 77, 55 So. 2d 873 (1951).

55. For example, it would be difficult to establish lack of one of the requisites of article 1779 of the Civil Code without use of parol evidence.

56. LA. CIV. CODE art. 1779: "Four requisites are necessary to the validity of a contract: 1. Parties legally capable of contracting. 2. Their consent legally given. 3. A certain object, which forms the matter of agreement. 4. A lawful purpose."

57. *See Sylvester v. Town of Ville Platte*, 218 La. 419, 49 So. 2d 746 (1950); *Overby v. Beach*, 220 La. 77, 55 So. 2d 873 (1951); *Unity Indus. Life Ins. Co. v. Dejoie*, 202 La. 249, 11 So. 2d 546 (1942); *LeBleu v. Savoie*, 109 La. 680, 33 So. 729 (1903).

58. *Cf. Hodge v. Hodge*, 151 La. 612, 92 So. 134 (1922); *Jefferson v. Herold*, 144 La. 1064, 81 So. 714 (1919).

59. The allegations must contain the facts constituting the defect; simply alleging fraud or misrepresentation as a conclusion of law is not sufficient. *See Helmer v. Adcock*, 166 La. 704, 117 So. 781 (1928); *Harris v. Crichton*, 158 La. 358, 104 So. 114 (1925).

60. *Cf. Unity Indus. Life Ins. Co. v. Dejoie*, 202 La. 249, 11 So. 2d 546 (1942); *Franks v. Davis Bros. Lumber Co.*, 146 La. 803, 84 So. 101 (1920); *LeBleu v. Savoie*, 109 La. 680, 33 So. 729 (1903).

61. 152 La. 880, 94 So. 430 (1922).

to contradict a recital of payment in the act of sale to show that the sale was null for want of consideration; however, the court allowed the evidence of non-payment as "tending to prove fraud . . . and as corroborative of the other evidence"⁶²

Parol may also be used to establish lack of lawful cause by a showing that the agreement was contracted "in fraudem legis." For example, parol has been admitted to show that the obligation or transfer was one absolutely prohibited by law, such as a prohibited donation to a concubine⁶³ or an agreement with insufficient consideration.⁶⁴

Although, as between the parties, a simulation may be established only by counter letter or other written evidence,⁶⁵ parol is admissible by a third person to establish a simulation to defraud a creditor,⁶⁶ and forced heirs may use parol to establish the simulations of those from whom they inherit.⁶⁷

When it is alleged that the writing was not effective between the parties because of a mistake in reducing the agreement to writing⁶⁸ and the evidence is sufficient to establish the error or mistake, reformation of the instrument will be allowed.⁶⁹ Even if the parol tends to contradict the writing, its admission may be justified on the ground that an instrument that does not accurately reflect the intent of the parties is not effective between them. The exception applies even when the parol affects the sale of an immovable; for instance, a misdescription of real estate in an act of sale may be corrected, "though its effect be to take out one piece of real estate . . . and substitute

62. *Id.* at 887, 94 So. at 432.

63. *Lazare v. Jacques*, 15 La. Ann. 599 (1860).

64. *Succession of Dupre*, 218 La. 907, 51 So. 2d 317 (1951).

65. *See, e.g., Franton v. Rusca*, 187 La. 578, 175 So. 66 (1937); *Succession of Block*, 137 La. 302, 68 So. 618 (1915); *Johnson v. Flanner*, 42 La. Ann. 522, 7 So. 455 (1890).

66. *Cf. Vasquez v. Romano*, 175 La. 835, 144 So. 591 (1932); *Houghton v. Houghton*, 165 La. 1019, 116 So. 493 (1928); *Bernard v. Guidry*, 109 La. 451, 33 So. 558 (1903).

67. LA. CIV. CODE art. 2239 provides in part: "[F]orced heirs shall have the same right to annul absolutely and by parol evidence the simulated contracts of those from whom they inherit" *See, e.g., Eberle v. Eberle*, 161 La. 313, 108 So. 549 (1926); *Rachal v. Rachal*, 4 La. Ann. 500 (1849).

68. *See, e.g., Weber v. H.G. Hill Stores, Inc.*, 210 La. 977, 29 So. 2d 33 (1946); *Standard Oil Co. v. Futral*, 204 La. 215, 15 So. 2d 65 (1943); *Reynaud v. Bullock*, 195 La. 86, 196 So. 2d 29 (1940).

69. *Cf. B. Segall Co. v. Trahan*, 290 So. 2d 854 (La. 1974). To establish such a mistake or error there must be "clear" and the "strongest possible" proof of the true terms of the agreement, with the burden resting on the person desiring to establish the error. *See Weber v. H.G. Hill Stores, Inc.*, 210 La. 977, 29 So. 2d 33 (1946); *Reynaud v. Bullock*, 195 La. 86, 196 So. 2d 29 (1940).

another. . . ."⁷⁰ In addition to allowing the use of parol to establish that an agreement lacking one of the requisites of article 1779⁷¹ was ineffective, the courts have held that parol may also be used to show that an unfulfilled suspensive condition existed which prevented the agreement from being effective between the parties.⁷²

Proof of Subsequent Oral Modification

Article 2276 clearly prohibits introducing parol to establish that the parties modified their written agreement by an understanding anterior to or contemporaneous with the writing. Although the words "or since" at the end of article 2276 could be read to preclude proof of a subsequent oral modification of a written agreement as well,⁷³ such a rule would greatly restrict freedom of contract, which includes the right to modify an existing agreement. The common law parol evidence theory does not preclude the subsequent oral modification of a written agreement because, if the parties alter the writing orally, the writing no longer constitutes the agreement. The Louisiana supreme court, in apparent recognition of the infringement upon freedom of contract that would attend a denial of the right to orally modify a written agreement, has held that the "or since" clause does not prohibit the proof of a subsequent oral modification or revocation of a written agreement.⁷⁴ According to the court, "the words 'or since'

70. *Waller v. Colvin*, 151 La. 765, 771, 92 So. 328, 331 (1922). See also *Agurs v. Holt*, 232 La. 1026, 95 So. 2d 644 (1957); *Brulatour v. Teche Sugar Co.*, 209 La. 717, 25 So. 2d 444 (1946).

71. Lack of valid consent may also be shown by parol evidence that the purported consent was obtained by force or duress. *Ball v. Campbell*, 219 La. 1076, 55 So. 2d 250 (1951); *Linkswiler v. Hoffman*, 109 La. 948, 34 So. 34 (1903); Comment, 47 TUL. L. REV. 381, 384 (1973).

72. See Comment, 47 TUL. L. REV. 381, 386 (1973). Cf. *Wampler v. Wampler*, 239 La. 315, 118 So. 2d 423 (1960); *Tessier v. La Nasa*, 234 La. 127, 99 So. 2d 56 (1958). But cf. *Quarles v. Lewis*, 219 La. 194, 52 So. 2d 713 (1951).

73. The history of the article indicates that such was the intended result. See *The Work of the Louisiana Supreme Court for the 1940-1941 Term—Evidence*, 4 LA. L. REV. 265, 272 (1942); Comment, 35 LA. L. REV. 745, 758 (1975).

74. See, e.g., *Tholl Oil Co. v. Miller*, 197 La. 976, 3 So. 2d 97 (1941); *Parlor City Lumber Co. v. Sandel*, 186 La. 982, 173 So. 737 (1937); *Salley v. Louviere*, 183 La. 92, 162 So. 811 (1935). The early case of *Sharkey v. Wood*, 5 Rob. 326 (La. 1843) applied the "or since" clause as written, but *Salley v. Louviere*, *supra*, and subsequent cases make it clear that *Sharkey* is not sound law.

Use of a subsequent oral agreement to modify a written contract is available only if the subject matter of the agreement does not require that the contract be in writing. Cf. *Quarles v. Lewis*, 219 La. 194, 52 So. 2d 713 (1951); *Conklin v. Caffall*, 189 La. 301, 179 So. 434 (1938). Thus, a subsequent oral agreement modifying the sale of an immovable would not be admissible. LA. CIV. CODE art. 2275.

have reference to the phrase 'what may have been said,' and not to what may have been agreed to, since the making of the written contract."⁷⁵

A party desiring to use the alleged subsequent agreement must clearly define it and establish the other party's consent to it.⁷⁶ He must also prove the cause prompting the adverse party to agree or the offered evidence will be excluded as a veiled attempt to prove an anterior or contemporaneous parol agreement.⁷⁷

Introduction of parol to prove an anterior or contemporaneous agreement adding a term that has since become executory has also been sanctioned by the jurisprudence by characterizing the addition as a subsequent modification. For example, in *Phillips v. Gillaspie*,⁷⁸ the court at first refused to allow parol proof of a term authorizing payment of a note in personal services. However, since the personal services had been offered, accepted and performed, the court found a subsequent agreement modifying the written agreement and admitted parol proof for that purpose.

Parol Proof of Additional Terms or Agreements

Although the parol evidence rule generally precludes the parties from establishing that there were additional agreements or terms not included in the writing, an exception to that prohibition is recognized by common law courts under certain conditions. Nothing in the Louisiana Civil Code authorizes an exception to article 2276 to allow parol proof of additional terms or agreements and the civilian theory of the parol evidence rule appears to mandate the exclusion of such proof. However, the Louisiana supreme court has adopted the common law exception.

Use of parol in such situations requires a showing that the parties did not intend for their entire agreement to be embodied in the writing or for the written instrument to be complete in itself as to the subject matter of the alleged term.⁷⁹ For example, parol evidence of an agreement to include good will in the transfer of a business would be excluded only if the circumstances indicate that the parties intended for the agreement to include all terms specifying which items were to pass in the sale. This concept is referred to in common law

75. *Salley v. Louviere*, 183 La. 92, 98, 162 So. 811, 813 (1935).

76. *Byrd v. Babin*, 196 La. 902, 200 So. 294 (1940).

77. *Monroe Inv. Co. v. Ford*, 168 La. 475, 122 So. 586 (1929).

78. 186 La. 45, 171 So. 567 (1936).

79. *Cf., e.g., Rosenthal v. Gauthier*, 224 La. 341, 69 So. 2d 367 (1953); *Smith v. Bell*, 224 La. 1, 68 So. 2d 737 (1953); *Davis v. Dees*, 211 La. 229, 29 So. 2d 774 (1947). See generally Comment, 47 TUL. L. REV. 381, 387 (1973).

jurisdictions as "integration" of all the terms of the agreement into the writing.⁸⁰

Before parol evidence may be admitted to establish the existence of additional terms, the lack of integration must be shown. Because parol evidence is necessarily admissible to prove lack of integration, the first question is not one of admissibility, but whether there is sufficient proof of lack of integration to come within the exception.⁸¹ Parol proof that the writing is not integrated has been admitted only when the evidence contradicts no term in the act.⁸² Thus, if the act recites that it contains the full and entire agreement of the parties, extrinsic evidence of the lack of integration would not be allowed.⁸³ Similarly, if the additional term to be established is contrary to one in the written instrument, no evidence of the additional term will be received, although the question of integration as to other terms is left open.⁸⁴

The Louisiana supreme court has employed several tests or methods to determine if the parties intended the writing to be the complete manifestation of their agreement. The least flexible criterion is a presumption, generally appearing in older cases, that the mere fact that the parties committed their agreement to writing indicates that they must have intended to include all the terms of the agreement in the writing.⁸⁵ The presumption would appear to have its greatest application when the parties are of equal bargaining power and are represented by skilled negotiators expected to ensure that terms favorable to each side are included in the writing.⁸⁶

If a presumption of integration exists, the person introducing the parol will generally be required to establish the absence of integration. Such allocation of the burden of proof is consistent with the

80. See CORBIN §§ 581-82; WIGMORE §§ 2425-53; WILLISTON § 633; Comment, 47 TUL. L. REV. 381, 387 (1973).

81. Cf. *Fontenot v. Jones*, 210 La. 166, 26 So. 2d 490 (1946); Note, 14 LA. L. REV. 704 (1954).

82. Cf., e.g., *Rosenthal v. Gauthier*, 224 La. 341, 69 So. 2d 367 (1953); *Landry v. Adaline Sugar Factory Co.*, 52 La. Ann. 258, 26 So. 824 (1899); *New Orleans & Carrollton R.R. v. Darms*, 39 La. Ann. 766, 2 So. 230 (1887).

83. Cf. *Travia v. Metropolitan Life Ins. Co.*, 186 La. 934, 173 So. 721 (1937).

84. Cf., e.g., *Harnischfeger Sale Corp. v. Sternberg Co.*, 179 La. 317, 154 So. 10 (1934); *Fudickar v. Inabnet*, 176 La. 777, 146 So. 745 (1933); *Hafner Mfg. Co. v. Lieber Lumber & Shingle Co.*, 127 La. 348, 53 So. 646 (1910).

85. See, e.g., *Standard Oil Co. v. Futral*, 204 La. 215, 15 So. 2d 65 (1943); *Parlor City Lumber Co. v. Sandel*, 186 La. 982, 173 So. 737 (1937); *Garland v. Dimitry*, 167 La. 262, 119 So. 42 (1928).

86. *Garland v. Dimitry*, 167 La. 262, 119 So. 42 (1928) (presumption applied where parties were both attorneys).

practice of placing the burden on the one desiring to use parol to prove one of the other exceptions to article 2276.⁸⁷ However, some cases seem to place the burden on the one claiming there is an integration, since the opinions advance reasons in support of a finding of integration, rather than merely stating that there was insufficient evidence of lack of integration.⁸⁸

Language in other opinions suggests a second test of integration which limits inquiry strictly to the terms of the instrument.⁸⁹ According to the "four corners" test, if the instrument is "complete" on its face, that is, if all relevant information appears to be included, the intent to integrate will be presumed and no alleged additional terms may be established.⁹⁰ Conversely, if all relevant information is not included and the instrument appears incomplete, proof of additional terms may be presented.⁹¹ However, despite the language restricting investigation to the "four corners" of the instrument, courts must necessarily consider the circumstances of the particular case and consult outside sources to determine what sort of relevant information should be expected in a complete instrument.

Evidence of integration will be found when an alleged additional term is similar in subject matter to the terms of the instrument, even absent direct conflict between the written and additional terms;⁹² the reasoning apparently is that if the alleged term were in fact part of the agreement, it would have been included in the writing with the similar terms. In *Smith v. Bell*,⁹³ a vendor sought to establish an additional agreement that ownership of certain farm implements was not intended to pass in the sale of the farm. However, because the

87. See note 69 *supra*.

88. See, e.g., *Moosy v. Huckabay Hosp., Inc.*, 283 So. 2d 699 (La. 1973); *Hafner Mfg. Co. v. Lieber Lumber & Shingle Co.*, 127 La. 348, 53 So. 646 (1910); *Hebert v. Dupaty*, 42 La. Ann. 343, 7 So. 580 (1890). It has been argued that the Uniform Commercial Code creates a presumption that writings are rarely integrated, making it less difficult to introduce evidence of additional terms in states that have adopted the U.C.C. See Comment, 47 TUL. L. REV. 381, 396 (1973).

89. See *Moosy v. Huckabay Hosp., Inc.*, 283 So. 2d 699 (La. 1973); *McGuire v. Nelson Bros.*, 177 La. 302, 148 So. 56 (1933). Cf. *Davis v. Dees*, 211 La. 229, 29 So. 2d 774 (1947).

90. See *Moosy v. Huckabay Hosp., Inc.*, 283 So. 2d 699 (La. 1973).

91. See *Hamill v. Moore*, 194 La. 486, 193 So. 715 (1937); *Rugely v. Goodloe & Co.*, 7 La. Ann. 294 (1852).

92. Compare *Hebert v. Dupaty*, 42 La. Ann. 343, 7 So. 580 (1890) (parol proof of collateral agreement to transfer good will in the sale of a business excluded) with *Davies v. Bierce*, 114 La. 663, 38 So. 488 (1905) (similar evidence admitted). See also *Smith v. Bell*, 224 La. 1, 68 So. 2d 737 (1953); *J.A. Fay & Egan Co. v. Roseland Box Co.*, 170 La. 602, 128 So. 649 (1930); *Clark v. Farrar*, 3 Mart. (O.S.) 247, 250 (La. 1814).

93. 224 La. 1, 68 So. 2d 737 (1953).

writing listed other comparable items which were not to be transferred by the sale, the court found an intent to embody in the writing all exclusions from the sale and refused to permit the offered proof. Although the listing in *Smith* simplified the court's determination of integration, even when the writing does not include a comparable provision, integration is generally found as to closely related additional terms.⁹⁴

The type of written agreement involved also has a bearing on the question of integration. If the agreement is a bargained-for contract on both sides, integration is more likely to be found than if it were a boilerplate or preprinted agreement composed of terms favorable to one side only and the parol was offered by the party who prepared the agreement.⁹⁵

To decide if an agreement is integrated, the Louisiana supreme court looks outside the instrument to the circumstances surrounding the agreement and considers all of the indicia discussed above, without assigning controlling weight to any one factor. A pair of similar cases with contrary holdings illustrates the court's approach. In *Rosenthal v. Gauthier*,⁹⁶ parol evidence of a cost limit applicable to a construction contract was admitted, while in *Moosy v. Huckabay Hospital, Inc.*,⁹⁷ such evidence was excluded. In *Rosenthal*, the written agreement contained little cost information beyond the construction cost; in *Moosy*, the agreement contained numerous cost contingency terms, although it did not include a cost limitation. In addition, in *Moosy* the actions of the parties during the construction of the building were inconsistent with a cost limitation. Thus, the *Moosy* court concluded from the circumstances surrounding the agreement that the parties intended to include all the cost terms of their agreement in the writing and parol proof of an additional term was not allowed.

94. Cf., e.g., *Moosy v. Huckabay Hosp., Inc.*, 283 So. 2d 699 (La. 1973); *Davis v. Dees*, 211 La. 229, 29 So. 2d 774 (1947); *Franks v. Davis Bros. Lumber Co.*, 146 La. 803, 84 So. 101 (1920). Conversely, that the alleged additional term is of a different nature from the subject matter in the written agreement is evidence of lack of integration. See *Tessier v. La Nasa*, 234 La. 127, 99 So. 2d 56 (1958); *Landry v. Adaline Sugar-Factory Co.*, 52 La. Ann. 258, 26 So. 824 (1899); *New Orleans & Carrollton R.R. v. Darms*, 39 La. Ann. 766, 2 So. 230 (1887); *Rugely v. Goodloe & Co.*, 7 La. Ann. 294 (1852).

95. See Note, 14 LA. L. REV. 704 (1954); Note, 8 LA. L. REV. 427 (1948).

96. 224 La. 341, 69 So. 2d 367 (1953), criticized in *The Work of the Louisiana Supreme Court for the 1953-1954 Term — Conventional Obligations*, 15 LA. L. REV. 282, 285 (1955).

97. 283 So. 2d 699 (La. 1973).

Use of Parol Evidence in the Interpretation of Agreements

The fourth major exception to the parol evidence rule recognized by the Louisiana supreme court allows use of parol to aid in the interpretation of written agreements, usually when an ambiguity in the writing requires resolution.⁹⁸ While several articles of the Civil Code support looking beyond the document to extrinsic evidence to ascertain the meaning of ambiguous terms,⁹⁹ such articles refer to particular circumstances or types of evidence¹⁰⁰ and do not seem to justify the broad judicial use made of parol evidence to resolve ambiguities. The court's justification for its use of parol evidence in these circumstances is that the evidence is "consistent with the agreement and not offered for the purpose of altering, contradicting, varying, enlarging, or restricting."¹⁰¹

Though the exception is easily expressed, a major problem arises in defining the limits of ambiguity. The most obvious instance of ambiguity occurs when the terms of the instrument alone leave doubt as to the legal positions of the parties, absent introduction of extrinsic evidence. For example, after a vendor transferred his one-half interest in mineral-bearing property by an agreement reserving "one-half of all the . . . minerals"¹⁰² to the vendor, a dispute arose as to whether the clause meant one-half of the minerals in the portion transferred or one-half of the minerals in the land. Finding the clause capable of either construction, the court properly allowed parol to explain the intent of the parties. Similarly, parol has been admitted to ascertain the date intended when the act recited that payments were due "from such date."¹⁰³

When the instrument is not so clearly ambiguous on its face, the problem is more difficult. The facts of two cases furnish examples of

98. See, e.g., *Dufrene v. Tracy*, 232 La. 386, 94 So. 2d 297 (1957); *Angelloz v. Southwestern Oil & Ref. Co.*, 215 La. 1056, 42 So. 2d 753 (1949); *Rudman v. Dupuis*, 206 La. 1061, 20 So. 2d 363 (1944). Such extrinsic evidence may include "all pertinent facts and circumstances, including the parties' own conclusion of its [the contract's] meaning. . . ." *Cardos v. Cristadore*, 228 La. 975, 982-83, 84 So. 2d 606, 609 (1955).

99. LA. CIV. CODE arts. 1948, 1949, 1953, 1956.

100. For example, Civil Code article 1953 sanctions looking to "the usage of the country" and article 1956 allows reference to the parties' own construction of the contract to resolve ambiguities.

101. *Reuter v. Reuter's Succession*, 206 La. 474, 483, 19 So. 2d 209, 212 (1944). See also *Collins v. Brunet*, 239 La. 402, 118 So. 2d 454 (1960); *Hamil v. Moore*, 194 La. 486, 193 So. 715 (1940).

102. *Krauss v. Fry*, 209 La. 250, 254, 24 So. 2d 464, 466 (1945).

103. *Angelloz v. Southwestern Oil & Ref. Co.*, 215 La. 1056, 42 So. 2d 753 (1949). See also *Dufrene v. Tracy*, 232 La. 386, 94 So. 2d 297 (1957); *Cardos v. Cristadore*, 228 La. 975, 84 So. 2d 606 (1955); *Gulf Ref. Co. v. Garrett*, 209 La. 674, 25 So. 2d 329 (1946).

what the court has viewed as indicia of ambiguity. In *Gulf Refining Co. v. Garrett*,¹⁰⁴ the court held that differing interpretations of the same agreement by two lower courts evidenced sufficient ambiguity in the writing to justify admission of parol. Likewise, an admission by the adverse party in his brief that the written agreement needed interpretation rendered the ambiguity exception available in *Reuter v. Reuter's Succession*.¹⁰⁵ The court has failed to indicate further guidelines, however, leaving the determination of ambiguity a subjective one for each court to make. Once a writing is found ambiguous, the question remains whether the extrinsic evidence admitted will be sufficient to correctly resolve the ambiguity. Because allowance of extrinsic evidence to clarify ambiguities seems to make an improper construction less likely than if all parol evidence concerning the intent of the parties were excluded, a strong argument can be made that courts should be liberal in finding ambiguities and in permitting use of parol evidence to resolve them.¹⁰⁶

Even more difficult are the situations where the instrument is not ambiguous on its face, but one of the parties desires to use extrinsic evidence to establish that a latent ambiguity exists in the writing. Allowing use of parol to establish such a latent ambiguity would contradict those cases which limit the court's inquiry to the "four corners" of the instrument.¹⁰⁷ Similarly, other cases indicate that if the meaning of the words of the act are "plain," no proof of ambiguity may be allowed.¹⁰⁸ Despite these strong jurisprudential pronouncements, some cases have nevertheless indicated without explanation that parol proof to resolve a latent ambiguity is proper.¹⁰⁹

Parol has been admitted to complete the identification of property ambiguously described in an act of sale, a practice referred to as "eking out title by parol." However, the property must be identified explicitly enough to ascertain from the writing the particular tract

104. 209 La. 674, 25 So. 2d 329 (1946).

105. 206 La. 474, 19 So. 2d 209 (1944).

106. See Comment, 47 TUL. L. REV. 381, 399 (1973).

107. See text at notes 89-91 *supra*.

108. See, e.g., *Standard Oil Co. v. Futral*, 204 La. 215, 15 So. 2d 65 (1943); *Garland v. Dimitry*, 167 La. 262, 119 So. 42 (1928); *Laurent v. Laurent*, 146 La. 939, 84 So. 212 (1920).

109. Cf. *Smith v. Chappell*, 177 La. 311, 148 So. 242 (1933); *St. Landry State Bank v. Meyers*, 52 La. Ann. 1769, 28 So. 136 (1898); *Madison v. Zabriskie*, 11 La. 247 (1837). Interpretation of an agreement may depend on a custom of the industry with which the agreement is concerned. The Louisiana supreme court has allowed use of parol to establish the custom of an industry as a latent ambiguity and has interpreted the agreement in accordance with the custom. *Rugely v. Goodloe & Co.*, 7 La. Ann. 294 (1852).

intended to be transferred, so as not to leave the title substantially resting on parol.¹¹⁰ An act of sale identifying property as "124 Stella Street, on grounds measuring about 60 x 154" ¹¹¹ was sufficiently specific for the court to find that the title was based essentially on the writing and therefore to admit parol evidence to further identify the property.¹¹² On the other hand, receipts stating "[r]eceived . . . \$35.00 for payment on place"¹¹³ were held insufficient to allow use of parol to further identify the property.¹¹⁴

Use of Parol to Establish True Consideration

Civil Code article 1900,¹¹⁵ allowing parol to establish the "existence of the true and sufficient consideration" if the cause expressed in the agreement has been disproved, provides another exception to article 2276. For example, if a creditor attacked a sale or transfer of his debtor as a simulation, article 1900 would allow the debtor to use parol to establish the true cause of the agreement in order to sustain the contract.¹¹⁶ Article 1900 has also been invoked to sanction use of parol to sustain the agreement when it was alleged that a donation was not clothed in the proper formalities¹¹⁷ or that there was a failure of cause.¹¹⁸

Although the court has made broad statements to the effect that the cause of the agreement is generally open to proof of its true nature,¹¹⁹ other cases have implicitly limited application of article 1900

110. See *Lamoine v. Lacour*, 213 La. 109, 34 So. 2d 392 (1948); *Kernan v. Baham*, 45 La. Ann. 799, 13 So. 155 (1893).

111. *Walker v. Ferchaud*, 210 La. 283, 286, 26 So. 2d 746 747 (1946).

112. *Id.* See also *Croom v. Noel*, 143 La. 189, 78 So. 442 (1918); *Barfield v. Saunders*, 116 La. 136, 40 So. 593 (1906).

113. *Lamoine v. Lacour*, 213 La. 109, 113, 34 So. 2d 392, 393 (1948).

114. *Id.* See also *White v. Ouachita Natural Gas Co.*, 172 La. 1052, 150 So. 15 (1933); *Lattimer's Heirs v. Gulf Ref. Co.*, 146 La. 249, 83 So. 543 (1919); Note, 21 TUL. L. REV. 706 (1947).

115. LA. CIV. CODE art. 1900 provides: "If the cause expressed in the consideration should be one that does not exist, yet the contract cannot be invalidated, if the party can show the existence of a true and sufficient consideration."

116. See, e.g., *Warden v. Porter*, 228 La. 27, 81 So. 2d 707 (1955); *Citizen's Bank & Trust Co. v. Willis*, 183 La. 127, 162 So. 822 (1935); *Guaranty Bank & Trust Co. v. Hunter*, 173 La. 497, 137 So. 904 (1931).

117. See *Succession of Diez*, 194 La. 1089, 195 So. 613 (1940); *Cleveland v. Westmoreland*, 191 La. 863, 186 So. 593 (1939).

118. See *Love v. Dedon*, 239 La. 109, 118 So. 2d 122 (1960); *Stephens v. Anderson-Dunham, Inc.*, 234 La. 237, 99 So. 2d 95 (1958); *Combon Bros. v. Suthon*, 147 La. 66, 84 So. 496 (1920).

119. See *Love v. Dedon*, 239 La. 109, 118 So. 2d 122 (1960); *Stephens v. Anderson-Dunham, Inc.*, 234 La. 237, 99 So. 2d 95 (1958); *Cleveland v. Westmoreland*, 191 La. 863, 186 So. 593 (1939).

to those situations in which the agreement is attacked for invalidity of cause and the parol is to be used to sustain the agreement.¹²⁰ While the failure of consideration may be established between the parties by parol evidence,¹²¹ the reason for admission is that such evidence is not against or beyond the act,¹²² rather than the operation of article 1900.

Conclusion

Based on the premise that writings are more trustworthy than parol testimony, the exclusionary rule of article 2276, designed to protect the integrity of writings from attack by parol, was incorporated into the Civil Code. Nevertheless, it would appear that writings can be sufficiently protected without a per se rule of exclusion of conflicting or additive parol, if the relative values of the writings and the parol are balanced against one another. In the balancing process, an authentic act would be accorded more weight than a rough writing; similarly, testimony of an additional term corroborated by reliable witnesses would carry more weight than the uncorroborated testimony of one of the parties. Although due weight would be accorded to the writing, at some point, the circumstances would lend such credence to the parol that its value would outweigh that of the writing especially when attendant circumstances indicate that the written instrument is not a valid, complete, and accurate manifestation of the intent of the parties.

Despite the broad language of article 2276, it appears that the Louisiana supreme court has followed just such a procedure without labeling it a balancing process.¹²³ Once it has been found that article 2276 is applicable, parol evidence may be introduced to determine if an exception is available. The court determines if an exception is available by considering whether the circumstances indicate that the writing represents validly, accurately, and completely the agreement

120. See *Brewer v. New Orleans Land Co.*, 154 La. 446, 97 So. 605 (1923); *Pfeiffer v. Nienaber*, 143 La. 601, 78 So. 977 (1918); *Dwight v. Kemper*, 8 La. Ann. 452 (1853); *The Work of the Louisiana Supreme Court for the 1957-1958 Term — Conventional Obligations*, 19 LA. L. REV. 315, 317 (1953).

121. See *Belknap Hardware & Mfg. Co. v. Hearn*, 179 La. 909, 155 So. 396 (1934); *Parker v. Broas*, 20 La. Ann. 167 (1868); *Krumbhaar v. Ludeling*, 3 Mart. (O.S.) 640 (La. 1815).

122. Cf. *Dickson v. Ford*, 38 La. Ann. 736 (1886). See also text at notes 37-49 *supra*.

123. Cf. *Moosy v. Huckabay Hosp., Inc.*, 283 So. 2d 699 (1973); *Smith v. Bell*, 224 La. 1, 68 So. 2d 737 (1953); *Rosenthal v. Gauthier*, 224 La. 341, 69 So. 2d 367 (1953); *Davies v. Bierce*, 114 La. 663, 38 So. 488 (1905).

of the parties. In effect, the judges balance the relative values of the writing and the parol,¹²⁴ although the opinion will indicate that the court has merely decided an issue of the admissibility of evidence.

The procedure used by the Louisiana supreme court clearly follows that of the common law courts and is a departure from the civilian theory underlying article 2276. A strict application of article 2276 and the consequent broad exclusion of parol in the face of a writing could result in precisely the type of fraud and deceit article 2276 was designed to prohibit; a party could rely on his writing even though it was clear that the writing did not validly, accurately, and completely represent the agreement of the parties. Apprehension that the parol evidence rule might be used as a cloak for fraud is probably the unstated reason why the Louisiana supreme court has adopted common law thinking,¹²⁵ and furnishes a convincing justification for departing from strict civilian doctrine.

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124. For this reason it has been said that despite its name, the parol evidence rule is a matter of substantive law. CORBIN § 573, at 534; WILLISTON § 632, at 502.

125. Cf. *Gulf States Fin. Corp. v. Airline Auto Sales, Inc.*, 248 La. 591, 181 So. 2d 36 (1965).